Supreme Court, U.S.
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No. 91-2074

In the Supreme Court of the United States

OCTOBER TERM, 1992

ANTON BAUMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SUSAN MASLING
ROBERT J. GRONER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's service as an armed guard at a Nazi concentration camp rendered him ineligible for a visa under the Immigration Act of 1924.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-20) is unreported, but the judgment is noted at 958 F.2d 374 (Table).[1] The opinion of the district court (Pet. App. 21-30) is reported at 764 F. Supp. 1335.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1992. On March 31, 1992, the court granted a motion to modify its order. See App., *infra*, 1a-3a. The petition for a writ of certiorari was filed

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[1] On March 31, 1992, the court of appeals modified its opinion. See App., *infra*, 1a-3a.

on June 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in Such-Borova, Yugoslavia, in 1911. In November 1942, he began service with the Waffen-SS, the elite guard of the Nazi party. From November 1942 until September 1943, he was a member of the SS-Totenkopf-Sturmbann (Death's Head Battalion) and served as an armed, uniformed guard at the Stutthof concentration camp. In September 1943, he was transferred to the Buchenwald concentration camp. Pet. App. 9-11.

Petitioner's service as an armed guard at Stutthof was established by an SS Personnel Data Card and a roster of the Death's Head Battalion at Stutthof. The SS Card includes a picture of petitioner in a Death's Head Battalion uniform and identifies him by his date and place of birth, profession, spouse, ethnic German origin, the number and sex of his children, and the date of his prior military service. The roster identifies petitioner by place and date of birth and by his spouse's name and place of birth. Pet. App. 10-11.

SS guards were responsible for preventing prisoners from escaping and were under orders to shoot prisoners who attempted to escape. Some guards were also charged with conducting prisoner work details, which often resulted in the inhuman treatment of prisoners. The guards were paid and were permitted to take leave. Pet. App. 23. At trial, the parties stipulated that the operation of the Stutthof concentration camp constituted activity contrary to civilization and human decency. *Id.* at 11.

2. On June 15, 1950, petitioner applied to immigrate to the United States.[2] On his application for an immigrant visa, petitioner falsely listed his place of residence from 1925 to 1944 as Such-Borova, Yugoslavia, and did not disclose his residence at Stutthof or the nature of his duties there. Petitioner swore under oath to the truth of the statements on his application. He was admitted to the United States on July 5, 1950. Pet. App. 12, 24.

In 1957, petitioner applied for naturalization. Question 9 of the application form required him to list every organization, association, or group of which he had been a member. Petitioner responded "None," and swore under oath that all of his answers were true. On May 14, 1957, petitioner was naturalized as a United States citizen. Pet. App. 12-13.

3. On March 29, 1989, the government brought suit under Section 340(a) of the Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1451(a), to revoke petitioner's citizenship. After a three-day trial, at which petitioner offered no evidence or testimony to rebut the government's case, the district court found that as a result of his service as an armed guard at Stutthof, petitioner had been ineligible for a visa. The court therefore held that petitioner's citizenship was illegally procured because he was not lawfully admitted with a valid visa, as required by Section 316(a)(1) of the INA, 8 U.S.C. 1427(a)(1). The district court also found that peti-

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[2] Petitioner entered the United States under the Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924 Act). Regulations promulgated under the 1924 Act denied admission to anyone who had "acquiesced in activities or conduct contrary to civilization and human decency." App., *infra*, 1a-2a.

tioner gave false testimony for the purpose of obtaining immigration benefits and therefore lacked the good moral character required to become a United States citizen under Section 316(a)(3) of the INA, 8 U.S.C. 1427(a)(3). Pet. App. 13-14, 25-29.

4. The court of appeals affirmed the judgment of the district court ordering petitioner's denaturalization. The court noted that petitioner had not challenged the district court's finding that he gave false testimony for the purpose of obtaining immigration benefits and therefore lacked the good moral character required to become a United States citizen. The court of appeals affirmed the district court's finding that undisputed evidence established petitioner's service as an armed guard at Stutthof. The court concluded that such guard service constituted acquiescence in Nazi persecution and rendered him ineligible for a visa as a matter of law. The court rejected petitioner's arguments that eyewitness testimony was required to revoke his citizenship and that, pursuant to *Petkiewytsch* v. *INS*, 945 F.2d 871 (6th Cir. 1991), the government had to prove that he actually participated in atrocities. Pet. App. 14-20.

ARGUMENT

1. Petitioner contends (Pet. 2-6) that the government was required to prove that he personally participated in individual acts of persecution in addition to his duties as a Nazi concentration camp guard. Petitioner's contention is without merit.

As an initial matter, petitioner does not dispute the lower court's determination that he gave false testimony in obtaining his visa and therefore lacked the moral ~~good~~ character necessary for citizenship. Because that was an 'independent bas[is] for denatural-

ization" (Pet. App. 25), petitioner's contention, even if correct, would not alter the result in this case.

In any event, petitioner was ineligible for a visa because he served as an armed concentration camp guard. In *Fedorenko* v. *United States*, 449 U.S. 490 (1981), the Court held that "an individual's service as a concentration camp armed guard—whether voluntary or involuntary—made him ineligible for a visa" as a matter of law under the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009.[3] 449 U.S. at 512. The Court further held that the conduct of a guard "who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp" constituted assistance in persecution. *Id.* at 512 n.34.

Every court of appeals that has decided a denaturalization case regarding an armed Nazi concentration camp guard has followed *Fedorenko* in holding that guard service constitutes "assistance in persecution" and disqualifies the guard from citizenship. See *United States* v. *Linnas*, 685 F.2d 427 (2d Cir.), cert. denied, 459 U.S. 883 (1982); *United States* v. *Demjanjuk*, 680 F.2d 32 (6th Cir.), cert. denied, 459 U.S. 1036 (1982); *United States* v. *Schmidt*, 923 F.2d 1253 (7th Cir.), cert. denied, 112

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[3] Fedorenko entered the United States under Section 2(b) of the DPA. The Court determined that Section 2(b) incorporated the definition of a "displaced person" found in Annex I to the Constitution of the International Refugee Organization of the United Nations, which excluded persons who "assisted the enemy in persecuting civil populations." *Fedorenko*, 449 U.S. at 495.

S. Ct. 331 (1991); *United States* v. *Kairys*, 782 F.2d 1374 (7th Cir.), cert. denied, 476 U.S. 1153 (1986); *United States* v. *Schellong*, 717 F.2d 329 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984); *United States* v. *Tittjung*, 948 F.2d 1292 (7th Cir. 1991), cert. denied, 112 S. Ct. 3035 (1992).

Petitioner entered the United States under the Immigration Act of 1924 rather than the DPA. As the court of appeals explained, however, "the DPA provides a framework for analysis" in this case. App., *infra*, 2a. State Department regulations incorporated into the 1924 Act prohibited the admission of persons whose entry would be prejudicial to the interest of the United States, including persons who had "acquiesced in activities or conduct contrary to civilization and human decency" on behalf of the Axis powers during World War II. 22 C.F.R. 53.32, 53.33 (1949). Consequently, the 1924 Act—which proscribes mere *acquiescence* in persecution—is even more exacting than the DPA—which proscribes assistance in persecution.

The court of appeals correctly held that petitioner's service as an armed concentration camp guard made him ineligible for a visa under the 1924 Act as a matter of law.[4] Petitioner stipulated that the operation of the Stutthof concentration camp constituted activity contrary to civilization and human decency. Pet. App. 11, 23. This stipulation, in conjunction

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[4] Petitioner's assertion (Pet. 4) that "[i]t is difficult to point out the rationale of the Seventh Circuit in this matter in view of the fact that it merely issued an Order affirming the Judgment of the District Court" is mystifying. The court of appeals wrote an opinion, reprinted in the appendix to the petition, that fully explains the court's reasons for affirming the judgment of the district court.

with *Fedorenko*, requires a finding that petitioner's conduct as an armed guard constituted acquiescence in persecution in violation of the 1924 Act. Indeed, the court of appeals noted that petitioner "does not dispute the fact that service as an armed concentration [camp] guard would have barred him from obtaining his visa under the 1924 Act." App., *infra*, 2a.

2. Petitioner errs in contending (Pet. 2) that the decision in this case conflicts with the decision in *Petkiewytsch* v. *INS*, 945 F.2d 871 (6th Cir. 1991). The issue in *Petkiewytsch* was "whether a permanent resident alien who served involuntarily as a civilian guard in a German 'labor education camp' during the period of Nazi control * * * is subject to deportation" under the Holtzman Amendment to the INA, Pub. L. No. 95-549, §§ 101-105, 92 Stat. 2065-2066 (1978). 945 F.2d at 872.

The Holtzman Amendment, which was codified as Section 241(a)(19) of the INA, 8 U.S.C. 1251 (a)(19),[5] provides that an alien shall be deported if he acted under the direction of or in association with the Nazi government and "ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." Based on references to war criminals in the legislative history of the Holtzman Amendment, the *Petkiewytsch* court distinguished the Holtzman Amendment from the DPA and concluded that the Holtzman Amendment requires a "more searching" inquiry than the DPA into whether the alien engaged in persecution. After distinguishing

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[5] Section 241(a)(19) of the INA has been recodified by Section 602 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5077, and now appears at 8 U.S.C. 1251(a)(4)(D) (Supp. II 1990).

the facts of the case before it from those in *Fedorenko*, the court concluded that deporting Petkiewytsch "would not further the goal of the Holtzman Amendment and would carry out no discernible policy of the United States." 945 F.2d at 881.

Petkiewytsch has no application here. The *Petkiewytsch* Court added a gloss to the language of the Holtzman Amendment based on its belief that the Amendment was designed "at least in part, to accomplish a different purpose" from the DPA, 945 F.2d at 879, and based on its conclusion that the legislative history of the Amendment "appears to require active participation in persecution going beyond 'assistance.'" *Id.* at 880. We believe that the court in *Petkiewytsch* misread the legislative history of the Holtzman Amendment. But in any event, *Petkiewytsch* does petitioner no good, because no such language appears in the legislative history of the DPA or the 1924 Act. The court of appeals in *Petkiewytsch* expressly recognized that its gloss on the Holtzman Amendment would not be applicable to the DPA. 945 F.2d at 879. Because the 1924 Act is even more exacting than the DPA, it is clear that there is no conflict between *Petkiewytsch* and the court of appeals' decision in this case.

In addition, the facts of *Petkiewytsch* are quite different from the facts of this case. Petkiewytsch served in one of "the least punitive of all types of Nazi camps"; he was "at all times a reluctant civilian guard" who was imprisoned for failing to perform his duties diligently; and he was "totally exonerated" by British authorities after the war. 945 F.2d at 873, 881. The court therefore concluded that Petkiewytsch did not fit the profile of an armed concentration camp guard that was before this Court in

Fedorenko. Here, in contrast, petitioner was an armed, uniformed guard of the Waffen-SS (Pet. App. 22-23); petitioner stipulated that the operation of Stutthof concentration camp constituted activity and conduct contrary to civilization and human decency (*id.* at 23); and there is no evidence that petitioner was a reluctant guard or was exonerated for his guard service. Petitioner thus would not prevail even under the approach applied in *Petkiewytsch*.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

SUSAN MASLING
ROBERT J. GRONER
Attorneys

AUGUST 1992

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[6] Nor is there a conflict between this case and *Laipenieks* v. *INS*, 750 F.2d 1427 (9th Cir. 1985). See Pet. 3-4. That case, like *Petkiewytsch*, concerned the Holtzman Amendment—not the 1924 Act—and it involved a Latvian civilian police officer, not a concentration camp guard. Moreover, the holding of *Laipenieks* turned on the court's interpretation of the requirement that persecution be based on race, religion, national origin, or political opinion; the court held that the government failed to carry its burden of proving that Laipenieks' victims were persecuted because of their political beliefs. 750 F.2d at 1437.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 91-2649

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ANTON BAUMANN, DEFENDANT/APPELLANT

[Filed Mar. 31, 1992]

Appeal from the United States District Court
for the Eastern District of Wisconsin

No. 89-C-362
Thomas J. Curran, *Judge*

Before: Hon. WILLIAM J. BAUER, Chief Judge

Plaintiff-appellees motion for modification of order is GRANTED. The order issued March 23, 1992 is modified as follows:

> Page 2, paragraph 4 which begins "Baumann entered the United States . . ."
>
> is replaced by:
>
> "Baumann entered the United States in 1947 under the Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, 43 Stat. 153 ("1924 Act"). Reg-

ulations promulgated under the 1924 Act denied admission to persons who had "acquiesced in activities or conduct contrary to civilization and human decency" on behalf of the Axis powers during World War I. The Displaced Persons Act of 1948 ("DPA"), Pub. L. No. 80-774, § 2, 62 Stat 1009 authorized European refugees to emigrate to the United States, but specifically excluded individuals who had "assisted the enemy in persecuting individuals" during World War II. Although Baumann's entry was pursuant to the 1924 Act, because the activities in question occurred during World War II, the DPA provides a framework for analysis."

Page 3 Paragraph 3 which reads:

"Therefore he was ineligible for a visa under the DPA."

should read:

"Therefore has was ineligible for a visa under the 1924 Act."

Page 3, Paragraph 4 which reads:

"He does not dispute the fact that service as an armed concentration guard would have barred him from obtaining his visa under the DPA."

should read:

"He does not dispute the fact that service as an armed concentration guard would have barred him from obtaining his visa under the 1924 Act."

Page 4, Paragraph 2 which reads:

"As a matter of law, disclosure of the fact that a petitioner served as an armed guard at a con-

centration camp makes him ineligible for a visa under the DPA."

should read:

"As a matter of law, disclosure of the fact that a petitioner served as an armed guard at a concentration camp makes him ineligible for a visa.

Page 4 Paragraph 4 which reads:

"If the government proved his service as an armed unifromed guard, it sufficiently established that he assisted in persecution of persons because of race, religion or national origin under section 13 of the DPA."

should read:

"If the government proved his service as an armed uniformed guard, it sufficiently established that he assisted in persecution of persons."

Page 4, Paragraph 3

"As a matter of law, he was ineligible for a visa under the DPA.

should read:

"As a matter of law, he was ineligible for a visa under the 1924 Act."

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